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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of the Petition of the State of Ohio for the Authority to Continue to Regulate Commercial Mobile Radio Services	))))	PR File No. 94-SP7

COMMENTS OF GTE MOBILNET INCORPORATED IN OPPOSITION TO THE STATEMENT OF THE PUBLIC UTILITIES COMMISSION OF OHIO'S INTENTION TO PRESERVE ITS RIGHT FOR FUTURE RATE AND MARKET ENTRY REGULATION OF COMMERCIAL MOBILE SERVICES

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GTE Mobilnet Incorporated ("GTE Mobilnet") hereby files these Comments in Opposition to the Statement of the Public Utilities Commission of Ohio's ("PUCO") Intention to Preserve its Right for Future Rate and Market Entry Regulation of Commercial Mobile Services as filed with the Federal Communications Commission ("FCC") or ("Commission"), on August 10, 1994. PUCO's Statement falls well short of the FCC's requirements for a petition to continue regulating rates. Moreover, PUCO's Statement should be considered moot insofar as PUCO has the right under Section 37 C.F.R. 20.13 and Section 332(c)(3) to file a petition at any time for rate regulation authority. PUCO's statement should thus be dismissed outright.

Introduction

GTE Mobilnet's affiliate, GTE Mobilnet of Cleveland Incorporated, is the managing general partner of the wireline (Block B) carriers in the Cleveland, Akron, Canton and Lorain-Elyria, Ohio MSAs, as well as Ohio RSA 3. GTE Mobilnet is the wireline carrier in the B-2 Section of Ohio RSA 2. Since GTE Mobilnet provides cellular service throughout much of the north central part of Ohio, the continuation vel non of rate regulation is a matter of serious import to GTE Mobilnet.

The PUCO has failed to demonstrate, or even attempt to demonstrate, a need for continued rate regulation. It is apparent, even from the caption of the PUCO's Statement, that the PUCO is primarily concerned with preserving its right to petition the FCC to regulate CMRS rates in the future, should it believe conditions so dictate. GTE Mobilnet believes that the PUCO already holds the authority, guaranteed by Congress under the OBR, to petition the Commission for rate regulatory authority at any time in the future that the market conditions demonstrably warrant such action. 47 C.F.R. § 20.13(a); Section 332(c)(3)(A). As such, any submission would necessarily have to be within the framework established by the OBR. Thus, the appropriate course for the Commission is to promptly dismiss or deny the PUCO's "Statement of Intention" (to the extent it qualifies as a

petition under § 20.13 of the rules), making clear that any continuation of the State's current rate regulation is preempted by the OBR. This action would, of course, be without prejudice to the PUCO filing an appropriate petition to reinstate rate regulation if it so desires in the future. In the meantime, the State's right to future regulation is fully preserved by the regulatory framework established by Congress.

Summary

These Comments of GTE Mobilnet Incorporated ("GTE Mobilnet") are submitted on behalf of itself and its affiliate, GTE Mobilnet of Cleveland Incorporated, which provide cellular service in the state of Ohio. GTE strongly opposes the Public Utilities Commission of Ohio's Statement regarding continuation of its regulatory authority over CMRS rates.

The new regulatory scheme established by Congress in the Omnibus Budget reconciliation Act was intended to preempt state regulation of CMRS rates, thereby establishing a consistent national policy for CMRS rate regulation. In furtherance of this policy, the FCC has already determined, based on its review of pertinent data, that the CMRS market is sufficiently competitive to justify forbearance from rate regulation at the federal level. If the FCC were to grant the Ohio Petition, it would necessitate a revision of its earlier findings about the state of competition

in this market.

In order to overcome the very strong Congressional preference for federal preemption, a state must make a compelling showing that market conditions in that state are inadequate to protect subscribers from unjust or unreasonable rates. The test is a heavy one which can only be met by the submission of a strong showing regarding the character of the market itself and specific problems which the market conditions have created or are likely to create. The PUCO has not met this burden. It submitted no evidence at all. It made no effort to identify or describe the characteristics of the CMRS market in Ohio, to identify the carriers involved, or to identify in what way the market may be failing to prevent unjust or unreasonable rates. Rather, the PUCO acknowledges that it remains to be seen at this time whether conditions may in the future justify rate regulation at the state level. Because the statutory framework established by Congress specifically permits states to petition the FCC for rate regulation authority in the future if conditions so justify, the PUCO's present Petition is both premature and unnecessary.

The PUCO does suggest that it should continue to regulate rates via the mechanism of complaint proceedings. Because regulation by adjudication carries every bit as much force as regulation by rulemaking, the FCC should make it clear that complaint proceedings regarding rates have been preempted by

the Congressional mandate. Similarly, the PUCO suggests that it may continue to regulate roaming rates via its proposed continuing review of intercarrier roaming agreements. Again, a state should not be permitted to use indirect means of regulating rates any more than it may use direct means. Thus, the FCC should make clear that that form of rate regulation is prohibited as well.

For all of these reasons, GTE Mobilnet submits that no failure of market conditions has been demonstrated in Ohio, and, therefore, in keeping with the clear mandate of Congress, the PUCO's Statement should be promptly dismissed or denied.

Discussion

I. Congress intended for the Federal Communications Commission to be the sole regulator of rates associated with the provision of Commercial Mobile Radio Services.

A. Congress Expressed a Clear Preference for Federal Rather than State Regulation.

Any review of the PUCO Statement must begin with a single overarching premise. Congress has explicitly preempted State regulation, except in very narrow circumstances, of rates and market entry in the Omnibus Budget Reconciliation Act ("OBR"). Specifically, Section 332(c)(3)(A) of the OBR states:

> Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. §332(c)(3)(A).

This language expresses Congress' determination that the federal government, and hence the FCC, should be solely responsible for market entry and rate regulation in the Commercial Mobile Radio Services ("CMRS") market.

Legislative history also indicates that Congress intended for the FCC to facilitate all rate and market entry regulation for CMRS. Congress sought to ensure that all similar services throughout the country are accorded similar regulatory treatment. H. R. No. 2264 Conf. Rep. No. 213, 103d Cong. 1st Sess., p. 494 (1993). The only way to ensure a uniform national market structure, and thereby comply with Congressional intent, is for the federal government to establish a national regulatory framework for wireless services.

In the area of cellular rate and market entry regulation, Congress expressed a clear intention that the federal government have sole regulatory authority except in very limited cases. 47 USC § 332(c)(3)(A); see also Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory

Statement of Mobile Services, (Second Report and Order), 9 FCC Rcd. 1411, 1418 (1994). This preemption means states have a very limited authority to regulate rates. The OBR declares that States may petition the FCC for authority to regulate rates in only two circumstances: (1) in order to continue rate regulation in effect prior to June 1, 1993; or (2) to begin rate regulation of the CMRS market. The OBR, however, creates high standards for a State to meet before authority to regulate will be granted. To be successful in either circumstance, a State must demonstrate either that:

> (i) market conditions with respect to such [CMRS] services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
>
> (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

47 U.S.C. §332(c)(3)(A)(i) - (ii).

If the State can meet one of these requirements, the FCC may authorize the regulation, but only to the extent necessary to maintain just and reasonable rates or avoid unjust or unreasonably discriminatory rates. 47 U.S.C. §332(c)(3)(A)

B. The FCC has Already Determined that Market Conditions Do Not Justify Rate Regulation.

The FCC was charged with a mandate from Congress to

establish a national cellular telecommunications policy, undertaking its own evaluation of the cellular market. In implementing this charge, the FCC determined that ordinarily, the proper amount of regulation of the cellular market should be a forbearance from regulation on market entry. Second Report and Order at 1510-1511. The FCC came to this conclusion as a result of its initial finding that the cellular marketplace was sufficiently competitive to forbear from tariff requirements. Id. at 1478. While the Commission believed that further inquiry into the competitiveness of the cellular market is warranted, it plainly found, based on the data and analysis in the record, that there is "some competition" in the cellular marketplace. Id., at 1472. This finding echoed Congress' determination that the cellular market need not be heavily regulated. Id. at 1418. The level of competition was sufficient for the Commission to conclude that no tariff regulation was necessary at the federal level. Id. at 1478. It would be highly anomalous for the Commission to permit a State to reach a diametrically opposite determination, especially in the complete absence of any additional evidence.

Granting a State's request to continue rate regulation frustrates the FCC's policy of regulatory forbearance. Granting a petition also places the FCC in the precarious position of admitting that Congress' findings and its own decision to forbear, based on a certain level of competition in the cellular

marketplace, were misplaced. The proof provided to the Commission, therefore must be extremely compelling if it is to overcome Congress' and the FCC's determination that forbearance from rate and market entry regulation is appropriate.

II. The PUCO's Statement Does Not Satisfy the Requirements of the FCC's Regulations.

A. States Asking for Authority to Regulate CMRS Rates Must Submit Market Analysis Data in Their Petition and Meet a High Standard of Proof.

In a petition to regulate, a State must make a concrete showing that the cellular market is not competitive or capable of producing just or reasonable rates. In fact, section 20.13(a) of the FCC's rules requires that each petition show:

> (1) Demonstrative evidence that market conditions in the state for commercial mobile radio services do not adequately protect subscribers to such services from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory. Alternatively, a state's petition may include demonstrative evidence showing that market conditions for commercial mobile radio services do not protect subscribers adequately from unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory, and that a substantial portion of the commercial mobile radio service subscribers in the state or a specified geographic area have no alternatives [sic] means of obtaining basic telephone service. This showing may include evidence of the range of basic telephone service alternatives available to consumers in the state.
>
> (2) The following is a non-exhaustive list of examples of the types of evidence, information, and analysis that may be considered pertinent to determine market conditions and

consumer protection by the Commission in reviewing any petition filed by a state under this section:

(i.) The number of commercial mobile radio service providers in the state, the types of services offered by commercial mobile radio service providers in the state, and the period of time that these providers have offered service in the state;

(ii.) The number of customers of each commercial mobile radio service provider in the state; trends in each provider's customer base during the most recent annual period or other data covering another reasonable period if annual data is unavailable; and annual revenues and rates of return for each commercial mobile service provider;

(iii.) Rate information for each commercial mobile radio service provider, including trends in each provider's rates during the most recent annual period or other data covering another reasonable period if annual data is unavailable;

(iv.) An assessment of the extent to which services offered by the commercial mobile radio service providers the state proposes to regulate are substitutable for services offered by carriers in the state;

(v.) Opportunities for new providers to enter into the provision of competing services, and an analysis of any barriers to such entry;

(vi.) Specific allegations of fact (supported by affidavit of person with personal knowledge) regarding anti-competitive or discriminatory practices or behavior by commercial mobile service providers in the state;

(vii.) Evidence, information, and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates, or rates that are unjust or unreasonably discriminatory, imposed upon commercial mobile radio service subscribers. Such evidence should include an examination of the relationship between rates and costs. Additionally, evidence of a pattern of such rates, that demonstrates the inability of the

commercial mobile radio service marketplace in the state to produce reasonable rates through competitive forces will be considered especially probative;

(viii.) Information regarding customer satisfaction or dissatisfaction with services offered by commercial mobile radio service providers, including statistics and other information about complaints filed with the state regulatory Commission.

This high standard reflects the strong presumption in favor of preemption embedded in the OBR. To overturn that presumption, a high evidentiary standard must be met before a State will be allowed to regulate the cellular market and thus circumvent Congress' intent.

B. The PUCO Fails to Meet the Standards That the FCC Sets Out.

The PUCO's submission to the FCC does not meet any of the prerequisites necessary to justify continued rate or entry regulation of the CMRS market. The PUCO has provided no information whatsoever regarding market conditions in Ohio, as required by § 20.13(a). The FCC requested detailed and specific market and rate data from the States in their petition to continue rate regulation. The PUCO provided no such data. The Commission's rules further require identification and description in detail of the rules under which the State proposes to continue regulation of CMRS. See 20.13(b)(1) and (a)(4). Again, the PUCO submitted no such information. Simply stated, the PUCO failed,

in every respect, to satisfy the requirements set out by the FCC.

First, the PUCO fails to meet the threshold inquiry required by OBR and the FCC of proving either (1) that the market is failing to protect customers from unjust or unreasonable rates or that rates are unjustly or unreasonably discriminatory; or (2) that cellular service is a replacement for land line telephone service in the Ohio market and the market has failed to protect consumers. The FCC placed utmost importance on this evidentiary showing by stating that proof of inadequate market conditions or market replacement was necessary before considering a State's petition to regulate rates or market entry. The PUCO neither provides information about the CMRS market nor data indicating cellular service is replacing traditional land line telephone service. The FCC set out very explicit requirements of proof and the PUCO did not meet them. Indeed, far from providing "demonstrative evidence" that market conditions warrant continued regulation, the PUCO candidly acknowledges that it "remains to be seen" whether market conditions obviate the need for state regulation. Statement at p. 2. The PUCO's "Statement" thus fails to establish a prima facie case that continued State regulation is needed.[1]

Second, the PUCO provided no market data whatsoever to

[1] Indeed, it is not even clear precisely what regulation the state seeks to continue since it did not supply the information required by Section 20.13(a)(4).

support any contention that rate regulation is needed. The FCC, while saying the list is not exclusive, set forth very detailed examples of the types of data it expected in a State's petition for regulation. The PUCO provided nothing. Among other deficiencies, the State provided no description of the size, components or character of the CMRS marketplace in Ohio. The PUCO merely asserts that it must monitor the market.

In sum, the PUCO offers no evidence demonstrating why the presumption in favor of federal preemption of all rate regulation in the cellular market should be overcome. The FCC could not be more clear. State laws are preempted except in two circumstances, and then only when the State empirically demonstrates specific market conditions. The FCC expects the States to comply with a high standard of proof when asking for authority to regulate the cellular market. The PUCO therefore does not satisfy its burden.

III. The PUCO Did Not Comply With Ohio's Own Laws in Making the Determination That Further State Regulation of the Cellular Services Market is Necessary.

In its "Statement", the PUCO relies heavily on Ohio law to establish its jurisdiction over cellular services. The PUCO, however, did not comply with its own laws in deciding to petition the FCC for rulemaking authority over cellular service.

Like the legislatures of most States, the Ohio General Assembly has enacted laws, codified at Ohio Revised Code Section 121.22, which are commonly known as "sunshine" laws. Sunshine laws generally require that official action by governmental bodies or agencies be conducted at public or "open" meetings so that interested parties are notified of the proposed action and are afforded an opportunity to participate. The Ohio sunshine law specifically requires that all formal actions of the PUCO be adopted in an open meeting or are invalid as a matter of law. Ohio Revised Code § 121.22(H).

The PUCO did not comply with this statute when it decided to petition the FCC for continued authority to regulate the cellular market. It gave no notice of its intention to consider the decision, and did not decide the matter at a public meeting as required. In short, the PUCO circumvented its own law in submitting its "Statement" to the FCC. Because the very submission of the Statement was unlawful, the Commission should not, and may not, exacerbate the misconduct by granting a Petition which was not properly authorized in the first instance.

IV. Federal Preemption Precludes the PUCO From Regulating CMRS Rates or Entry in Any Manner.

A. Complaint Proceedings are Impermissible.

As set forth above, the PUCO has utterly failed to meet

the threshold showing necessary to justify continuation of rate regulation. The Commission should make it clear in resolving the PUCO's petition that the resulting federal preemption applies to two of the PUCO's current fields of rate regulation. The PUCO acknowledges that it regulates rates via its complaint process. Not to preempt state rate regulation in the complaint context would effectively eviscerate the Congressional intent regarding such regulations, for it is axiomatic that an agency can make law either by adjudication or by rulemaking. SEC v. Chenery Corp., 332 U.S. 194 (1947). If a State is precluded from regulating rates directly -- by tariff review and filing requirements and by adoption of other general rules -- it must also be precluded from regulating rates indirectly -- by deciding complaint cases and requiring carriers to act accordingly. With respect to the parties involved, precedents established in the context of complaint adjudications have equal force of law regarding rates as any other rate rule adopted by a State PUC. Thus, states should not be permitted to regulate rates through the back door of complaint proceedings. In denying the PUCO's "Statement" the FCC should make this principle explicit.

B. Roamer Agreement Review is Impermissible.

The PUCO must also be precluded from regulating intrastate roaming agreements between cellular companies. The PUCO currently requires cellular carriers to submit intercarrier

roaming agreements for approval before the agreements can go into effect in Ohio. The approval process involves an evaluation of proposed rates. If the PUCO finds a rate to be unacceptable, approval for the roaming agreement could be denied. The approval process amounts to rate regulation because the PUCO decides what intrastate rate agreements between cellular companies will be permissible. The PUCO apparently believes that regulation of roamer rates in this indirect manner escapes the federal pre-emption which would otherwise apply. In the absence of demonstrative evidence (which the PUCO has not supplied) federal law preempts such a practice. Because the PUCO has asserted that its continued regulation of inter-carrier roaming agreements does not constitute preempted "rate regulation," it is important for the Commission to make clear that regulation of inter-carrier roaming charges is indeed "rate regulation" which Congress has reserved to the Federal Government. The PUCO therefore may not continue to review and approve roaming agreements.

V. Conclusion

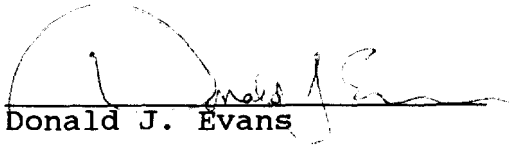
The PUCO seeks authority to retain its current regulatory framework and to have the ability to augment its directives in the future. Congress and the FCC have been clear that state rate and market entry regulations have been preempted by federal regulation of the cellular market. There are only two exceptions to the preemption, and states must meet a high burden

of proof in order to qualify under one of the exceptions. The PUCO has not produced any evidence to substantiate its claim that its market falls into one of the exceptions. The PUCO offered no empirical data, which the FCC explicitly requested, to demonstrate why the market must be regulated at the State level. The PUCO also failed to comply with its own laws in submitting its petition. Therefore, its assertion of continued jurisdiction over any type of rate or market entry regulation should be terminated by prompt denial of its petition.

WHEREFORE, in light of the foregoing, GTE Mobilnet respectfully requests that the petition filed by the Public Utilities Commission of Ohio be promptly dismissed for failure to set forth the elements essential to such petitions, or, in the alternative, promptly denied for failure to meet the significant burden of proof to which such petitions are subject.

Respectfully submitted,

GTE MOBILNET INCORPORATED



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CERTIFICATE OF SERVICE

I, Robert M. Winteringham, do hereby certify that true copies of the foregoing "Comment of GTE Mobilnet Incorporated in Opposition to the Statement of the Pubic Utilities Commission of Ohio's Intention to Preserve its Right for Future Rate and Market Entry Regulation of Commercial Mobile Services" were sent this 19th day of September, 1994, by first-class United States mail, postage prepaid, to the following:

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